Citibank Bhd v Classic Lane (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS D8 (S2)–24–1008 OF 2000
ABDUL WAHAB SAID AHMAD J
23 AUGUST 2005

Land Law — Charge — Order for sale — Cause to contrary — Matters relied on adjudicated in previous suit — Whether res judicata — Whether order for sale ought to be granted

The plaintiff, security agent and trustee for Citibank Bhd applied for an order for sale under ss 256 and 257 of the National Land Code 1965 of the defendant's property ('the land'). The land was charged by the defendant to the plaintiff for a term loan facility. The defendant had defaulted in payment. In opposing the application, the defendant raised, inter alia: (a) as cause to the contrary the issue that there was a challenge on the validity of the Loan Agreement and the charge in the previous suit ('the D8 suit') and therefore the plaintiff was estopped from commencing the proceedings; (b) the receivers and managers appointed by the plaintiff had filed an application in the High Court at Kuala Lumpur for the receivers and managers of the defendant to sell the land and should this order for sale be granted it would disrupt any steps taken by the receivers and managers and also affect the value of the sale; and (c) nugatoriness of the granting of the order since the D8 suit was pending appeal.

Held, granting the application:

(1) The defendant cannot re-litigate the issues it had raised in the D8 suit or raise the same as constituting cause to the contrary. The challenge to the charge had been litigated and was pending appeal before the Court of Appeal. Public interest demands that there should be finality in litigation. The mere fact that the D8 suit was pending appeal is not cause to contrary. A chargor must demonstrate and satisfy the court that the grant of order for sale would be contrary to some rule of law or equity. The defendant challenged the validity of the Loan agreement and charge, this had been litigated and determined in the D8 suit. The matter would therefore be res judicata between the parties and the defendant was precluded from relying on those grounds (see para 11).

(2) The fact that the receivers and managers had taken steps to advertise the sale of property in question cannot be cause to the contrary. The plaintiff's rights were statutory and it was embodied in the Security Documents. Its rights and powers were unfettered under the loan agreement by virtue of cl 14.03. Clause 21.2 of the charge provided that the plaintiff as Security Agent need not exhaust its remedy to sell the property before commencing any separate action. The position of the plaintiff was further strengthened by cl 7.2 of the Debenture in that the

Debenture itself provided that the plaintiff was entitled to exercise such concurrent remedies as provided by law (see para 16).

(3) Nugatoriness is relevant in a stay application, not in a statutory sale. Any actionable rights of the defendant in personam should be litigated instead of it being raised as cause to the contrary. The defendant had litigated in the D8 suit and could no longer raise it to oppose an order for sale (see para 19).

(4) The defendant had failed to establish cause to the contrary. The plaintiff had complied with all the statutory requirements under s 256 of the National Land Code to apply for an order for sale (see para 20).

[**Bahasa Malaysia summary**

Plaintif, iaitu agen sekuriti dan pemegang amanah bagi Citibank Bhd memohon untuk satu perintah jualan di bawah ss 256 dan 257 Kanun Tanah Negara 1965 ke atas hartanah defendan ('tanah tersebut'). Tanah tersebut dicagar oleh defendan kepada plaintif bagi kemudahan pinjaman. Defendan telah gagal dalam pembayaran balik. Dalam menentang permohonan ini, defendan membangkitkan, *inter alia*: (a) sebagai 'cause to the contrary' isu yang menyatakan bahawa terdapat bantahan terhadap kesahan Perjanjian Pinjaman itu dan cagaran dalam tindakan terdahulu ('tindakan D8') dan oleh itu plaintif adalah diestop daripada memulakan prosiding ini; (b) penerima dan pengurus yang dilantik oleh plaintif telah memfailkan satu permohonan di Mahkamah Tinggi di Kuala Lumpur bagi penerima dan pengurus defendan untuk menjual tanah tersebut dan sekiranya perintah jualan ini diberi ia akan mengganggu langkah yang diambil oleh penerima dan pengurus dan juga memberi kesan kepada nilai jualan; dan (c) pemberian perintah adalah tidak berguna kerana tindakan D8 sedang menanti rayuan.

Diputuskan, memberikan permohonan:

(1) Defendan tidak boleh litigasi semula isu yang telah dibangkitkan dalam tindakan D8 atau membangkitkannya sebagai 'cause to the contrary'. Bantahan terhadap cagaran itu telah dilitigasi dan sedang menunggu rayuan di hadapan Mahkamah Rayuan. Kepentingan awam menghendaki agar terdapat akhiran dalam litigasi. Fakta bahawa tindakan D8 sedang menunggu rayuan bukanlah satu 'cause to the contrary'. Seseorang penggadai perlu menunjukkan dan memuaskan mahkamah bahawa pemberian perintah jualan tersebut adalah bertentangan dengan sesuatu peraturan atau ekuiti. Defendan mencabar kesahan perjanjian pinjaman dan cagaran, ini telah dilitigasi dan ditentukan dalam tindakan D8. Oleh itu perkara ini adalah res judicata di antara pihak-pihak dan defendan adalah dihalang daripada bergantung kepada alasan-alasan tersebut (lihat perenggan 11).

(2) Fakta bahawa penerima dan pengurus telah mengambil langkah untuk mengiklankan jualan hartanah tersebut tidak boleh menjadi 'cause to the contrary'. Hak plaintif adalah statutori dan ianya terkandung dalam dokumen sekuriti. Hak dan kuasanya adalah tidak boleh dipersoalkan dibawah klausa 14.03 perjanjian pinjaman. Klausa 21.2 cagaran memperuntukkan bahawa plaintif sebagai Agen Sekuriti tidak perlu menghabiskan remedinya untuk menjual hartanah tersebut sebelum memulakan tindakan lain yang berasingan. Kedudukan plaintif dikuatkan oleh klausa 7.2 Debentur iaitu debentur tersebut memperuntukkan plaintif berhak untuk menggunakan semua remedi seperti yang diperuntukkan oleh undang-undang pada masa yang sama (lihat perenggan 16).

(3) Hujah pemberian perintah tidak berguna adalah relevan dalam permohonan bagi penggantungan, dan bukannya dalam jualan statutori. Sebarang hak defendan *in personam* patut dilitigasi dan bukannya dibangkitkan sebagai 'cause to the contrary'. Defendan telah melitigasinya dalam D8 dan tidak boleh lagi membangkitkannya untuk menentang perintah jualan (lihat perenggan 19).

(4) Defendan telah gagal untuk mewujudkan 'cause to the contrary'. Plaintif telah memenuhi semua kehendak dalam s 256 Kanun Tanah Negara untuk memohon satu perintah jualan (lihat perenggan 20).]

Notes

For cases on order for sale, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2052–2157.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)
China and South Sea Bank Ltd v Tan [1989] 3 All ER 539 (refd)
Hartecon JV Sdn Bhd v Hartela Contractors Ltd [1996] 2 MLJ 57(refd)
Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 221 (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)
Low Lee Lian v Ban Hin Lee Bank [1997] 1 MLJ 77 (refd)
Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd [1997] 2 MLJ 590 (refd)
United Malayan Banking Corp Bhd v Chong Bun Sun & another application [1994] 2 MLJ 221 (refd)

Legislation referred to

Exchange Control Act 1953
National Land Code 1965 ss 256, 256(3), 257, 340, Form 16D
Rules of the High Court 1980 O 83

RS Nathan (Ned Segaram with him) (Shearn Delamore & Co) for the plaintiff.
Henry Quah (Dzaki Ezhar Bahar with him) (Haniff & Rajendran) for the defendant.

Abdul Wahab Said Ahmad J:

[1] This originating summons was transferred to the Commercial Division because of a civil suit filed in this court involving the same parties and the same facts. The case is Kuala Lumpur High Court Civil Suit No D8–22–3219 of 1999 ('the D8 Suit').

[2] In this originating summons, the plaintiff applied for an order for sale under s 256 and 257 of the National Land Code of the defendant's property held under HS(D) 78401, s 57, Town of Kuala Lumpur known as the Genesis Tower. The land was charged by the defendant to the plaintiff for a Term Loan Facility of USD14,375,000. The defendant had defaulted in payment of the principal amount of USD11,875,000.00 that was due on 15 December 1999 to Citibank (L) Limited. The plaintiff is the security agent and trustee for the bank.

[3] In opposing the application, the defendant raised as cause to the contrary, the issue that there is a challenge on the validity of the loan agreement and the charge in the D8 suit and that therefore the plaintiff is estopped from commencing the present proceedings. Secondly, receivers and managers appointed by the plaintiff under the debenture had filed an application in the High Court at Kuala Lumpur, Commercial Division 3 for leave that the receivers and managers of the defendant sell the said land. Should this order for sale be granted, it would disrupt any steps taken by the receivers and managers to sell the property and whether it will marginally affect the value of sale of the Genesis Tower.

[4] Learned counsel for the defendant cited *Low Lee Lian v Ban Hin Lee Bank* [1997] 1 MLJ 77 where the Court of Appeal held that 'cause of the contrary' under s 256(3) of the National Land Code 1965 ('NLC') could only be established in three categories. They are:

(1) When a charger was able to bring his case within any of the exceptions indefeasibility doctrine in s 340 of the NLC;

(2) When a charger could demonstrate to a chargee that the chargee has failed to meet the conditions precedent for the making of an order for sale;

(3) When a charger could demonstrate that the grant of an order for sale could be contrary to some rule of law or equity.

[5] The defendant contended that the said issues are cause to the contrary against the order for sale sought for under the third category in *Low Lee Lian* ie that the grant of the order for sale would be contrary to some rule of law or equity.

[6] In their submissions, the plaintiff's learned solicitors said that all the requirements for an order for sale had been fulfilled. The plaintiff's solicitors had issued a 'Notice of Default of Charge in respect to a Charge' in Form 16D under the National Land Code 1965. In the notice, the defendant was given thirty days from the service of the notice to remedy the breach. The notice was served on the defendant by hand and registered post. The period prescribed in the notice had since expired and the defendant has failed to remedy the breach.

[7] As at the date of filing of encl 1, the amount outstanding was USD12,708,203.75. As at 2 February 2005, the date of hearing of the application the amount owing was USD15,394,105.16. This figure had taken into account the repayment by the defendant of interest amounting to the sum of USD861,618.80 on 8 June 2004.

[8] Defendant's alleged cause to the contrary relied on matters that had been adjudicated in the D8 suit where they had challenged the validity of the charge dated 14 May 1997. In the D8 suit, the defendant argued that the alleged failure to obtain the relevant consents of Bank Negara pursuant to the Exchange Control Act 1953 and/or ECM 10 notices renders the loan agreement and/or the charge void. The D8 suit by the defendant had been struck off after I heard arguments inter alia pertaining to the above issue.

[9] The plaintiff's learned solicitors said that the above issues cannot be re litigated as res judicata had set in. He cited *Hartecon JV Sdn Bhd v Hartela Contractors Ltd* [1996] 2 MLJ 57, where the Court of Appeal held that: 'once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened'.

[10] He next referred to *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, where it was held that: 'when a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties…'.

[11] I am in agreement with the plaintiff that the defendant cannot re litigate the issues it had raised in the D8 suit or raise the same as constituting cause to the contrary. The challenge to the charge had been litigated and is pending appeal before the Court of Appeal. Public interest demands that there should be finality in litigation. I am also satisfied that the mere fact that the D8 suit is pending appeal is not cause to the contrary. A chargor must demonstrate and satisfy the court that the grant of the order for sale would be contrary to some rule of law or equity. The defendant challenged the validity of the loan agreement and charge. This had been litigated and determined in the D8 suit. The matter would therefore be res judicata between the parties and defendant preclude from relying on those grounds.

[12] On the second cause to the contrary raised by defendant, even though receivers and managers had been appointed over the defendant pursuant to the debenture dated 20 December 1997 and steps had been taken to advertise the sale of the property, the plaintiff said that it is contractually entitled under the security documents to concurrently exercise all such remedies as are available to it under the law. Among others, cl 21.1 of the charge says that upon default, the security agent (the plaintiff) is not obliged to sell the property before commencing any separate action against the chargor. Further, clause 7.2 of the debenture says that upon default, the security agent shall concurrently exercise the powers provided by law.

[13] On the statutory right of the chargee, in *United Malayan Banking Corp Bhd v Chong Bun Sun & Another Application* [1994] 2 MLJ 221 Visu Sinnadurai J said: 'It is clear from these provisions of the Code that the law confers a special statutory right on the chargee to obtain an order for sale. This right is independent of any other causes of action which the chargee may have against the charger under the charge, or under any law.' This correctly is the right of the chargee bank. The bank as creditor has three modes of recovery. It could sue the debtor, sell the mortgaged securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. In *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590, Gopal Sri Ram JCA quoted with approval the passage from the decision of the Privy Council in *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 539 where it says that 'It is trite law that a creditor is entitled to pursue all the remedies available to him in law and in equity for the purposes of recovering money due to him from the debtor and his surety.' The chargee bank must be left to deal with the remedies which the original contract gave him. The bank is unfettered and at liberty to exhaust those remedies without limitation.

[14] Having decided to appoint receivers and managers under the debenture, the plaintiff is not precluded from initiating foreclosure proceedings. In short the plaintiff is entitled under the contract to take all actions that it deem commercially necessary to recover the amount.

[15] The plaintiff has dismissed as conjecture the defendant's allegation that if an order for sale is granted, the reserve price that is to be fixed will prejudice the efforts of the receivers and managers to sell the property by way of a private treaty. I agree the statutory right of the plaintiff for an order for sale is a right that is independent of any exercise of the receivers and managers' power of sale.

[16] The fact that the receivers and managers had taken steps to advertise the sale of the property in question cannot be cause to the contrary. The plaintiff's rights are statutory and it is embodied in the security documents. Its rights and powers are unfettered under the loan agreement, by virtue of cl 14.03. Clause 21.2 of the charge provides that the defendant as security agent

need not exhaust its remedy to sell the property before commencing any separate action. The position of the plaintiff is further strengthened by clause 7.2 of the debenture in that the debenture itself provides that the plaintiff is entitled to exercise such concurrent remedies as provided by law.

[17] Most important of all, the plaintiff's statutory right cannot be equated with the rights of a borrower under a debenture. The case of *Kimlin Housing Development Sdn Bhd (appointed Receiver and Manager) (In Liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 as cited by the plaintiff's learned counsels gave nine statutory safeguards. None of the safeguards apply to the receivers and managers. However, the fourth to ninth safeguards relate to conduct of the judicial sale and are safeguards to ensure that the interests of charger are fully protected during the various steps by which such sale is effected.

[18] It is clear that an order for sale is a fair mode of execution and there are safeguards that are statutory applicable to both the charger and the chargee. The defendant as charger is given ample opportunity to stop the sale by tendering the full sum before the fall of the hammer and even after that, to even set aside the judicial sale if it is proven that there is fraud or collusion in the way that the sale was conducted. It is because of these statutory safeguards that the plaintiff's statutory right cannot be defeated by the doctrine of estoppel. For this I refer to *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221, where Edgar Joseph Jr held that: 'the defence of estoppel based on the judgment of Wan Adnan J aforesaid, cannot arise since there can be no estoppel against a statute; specifically, the various provisions of the Code to which I have referred'. Further the case of *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 clearly states that estoppel has no application in foreclosure proceedings because a chargee who makes an application for an order for sale under the NLC does not commence any action but merely enforces a statutory remedy against the charger in default.

[19] The defendant had also raised the issue of nugatoriness if the order for sale is granted as the D8 suit is pending appeal. My short answer to this issue is that nugatoriness is relevant in a stay application not in a statutory sale. Any actionable rights of the defendant in personam should be litigated instead of it being raised as cause to the contrary. The defendant had litigated in the D8 suit and could no longer raised it to oppose an order for sale.

[20] By virtue of all the above arguments and authorities, I hold that the defendant has failed to establish cause to the contrary. I am satisfied that the plaintiff had complied with all the statutory requirements in under s 256 of the National Land Code to apply for an order for sale. The plaintiff had shown that all the appropriate statutory notice as stipulated under the Code had been given. All the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 had been followed. Having decided that there

is no cause to the contrary, I accordingly granted the order for sale as applied for by the plaintiff in their originating summons.

Plaintiff's application granted.

Reported by D Nesh